APPEAL NO. 92096
APRIL 27, 1992

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-l.0l *et seq.* (Vernon Supp. l992) (l989 Act). On February l4, l992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer concluded that appellant (claimant herein) was not injured in the course and scope of his employment with (Employer) and, therefore, not entitled to any benefits under the l989 Act. Claimant disputes the hearing officer's decision and asks us to find that claimant did sustain a compensable injury to his back. Claimant states that while he "generally agrees" with the hearing officer's findings of facts, he feels the hearing officer focused on claimant's preexisting or congenital spinal problems while ignoring his present herniated disc and need for surgery. Claimant urges that the hearing officer acquired a warped perspective concerning claimant's very real back injury because of claimant's congenital and pre-existing spinal problems, his recitation of the facts surrounding his injury, and his apparent poor record as an employee. Carrier, on the other hand, urges that claimant lacked credibility and simply failed to sustain his burden of proof in establishing that he sustained a job-related injury to his back.

DECISION

We affirm. The evidence is factually sufficient to support the findings of fact, conclusions of law, and decision of the hearing officer.

After the parties at the contested case hearing first agreed that the sole disputed issue before the hearing was whether claimant sustained an injury in the course and scope of his employment, an issue of the timeliness of claimant's notice of injury to his employer surfaced during the parties' opening statements. Claimant indicated that timely notice was an issue at the benefit review conference (BRC) but was not to be an issue at the contested case hearing. Carrier then voiced disagreement with the reason stated by claimant as to why notice was no longer an issue. Carrier stated that after the BRC, claimant was going to amend his notice to bring it within 30 days of the date of his injury and did so by submitting a new notice of injury form stating the date of injury as October 2, l99l, but now states his injury occurred in early September l99l. As the evidence unfolded, however, it became apparent that the potential issue concerning the timeliness of claimant's notice of injury was subsumed by the larger and agreed issue as to whether he had sustained a compensable injury at any time. While the parties did not pursue the timely notice issue as a separate, discrete disputed issue at the hearing, the hearing officer made no specific findings and conclusions on such issue, and claimant does not urge such issue on appeal, it is a matter that bears on the overall evaluation of the evidence in this case and was properly a matter before and considered by the hearing officer.

The evidence showed that claimant commenced employment with (Employer) on June 24, l99l, as a laborer with the road maintenance department. His duties included the

raking and shoveling of road paving materials. Soon after his employment, claimant, who was married and supporting his wife and four children, began to build a record of absenteeism which resulted in his being docked pay for a significant number of hours in July and August. In September l99l, he was docked pay for not working on the Tuesday, Wednesday, and Thursday (September 3-5) following the Labor Day holiday. His immediate supervisor prepared a warning letter dated September 5th, which claimant signed for on September l2th, which referred to a previous written counseling of August 28th regarding claimant's failure to call in or report to work on time. This warning letter placed claimant on probation for 30 days effective September 5th and stated that continued infractions would result in his termination. On October ll, l99l, claimant's employer prepared a letter to claimant advising him that Employer intended to terminate his employment for his failure to call his supervisor to report that he would not be at work on October 3, 7, 8, 9, l0, and ll, l99l. The letter invited claimant to attend a "pre-deprivation meeting" at 9:00 a.m. on October l6th and to present written justification for his "prolonged absence from work without notice." Claimant did not pick up the letter until after the time scheduled for the meeting and his employment was subsequently terminated effective October 16th.

The medical evidence introduced by the parties indicated that claimant had various spinal problems which may have included both congenital and/or pre-existing as well as more recent problems. The medical chronology picks up in August l99l during which month claimant testified that sometime in August l99l he pulled a neck muscle in an incident unrelated to his employment. The first date of significance in September was September 5th. Claimant said that in response to his request for a shorter drive to work, Employer, on September 5th, transferred him to precinct two where he was to report for his work. When he arrived there on September 5th claimant said he was told he could go home. However, Employer's records showed claimant was docked for that day. Claimant testified that on September 6th he went to work and while shoveling asphalt felt a sharp pain in his back. Claimant said that when doing paving work for previous employers he always used a shovel with a longer handle. However, his current employer provided shovels with shorter handles which required more bending. Claimant said he continued to work on September 6th, a Friday, and finished his shift.

On September l9th, claimant said he hurt his back when lifting a trash can full of water. He went to the (Hospital 1) emergency room on that date for treatment. He there identified his employer as (Employer). According to Hospital 1 records in evidence, claimant made no mention of a prior back injury on or about September 6th. He was diagnosed as having an acute lumbar myofascial strain and was released in about one hour with medications and instructions to avoid heavy lifting and to see a doctor the following week if his pain persisted. Claimant stated that the pain he experienced on September l9th was the same sharp pain as before only a little stronger. According to Employer's records claimant worked the following day and three of the five days the next week. He did not work at all in October and was terminated on October l6th.

On October 2nd, claimant visited (Hospital 2) at l2:05 p.m. According to the records

from this hospital, claimant's complaint was that he "fell off of step ladder last night" and was complaining of low back pain. These records went on to state that claimant was putting a box up in an attic and stumbled on the first step of the ladder but did not fall. The location of the attic wasn't identified. According to Employer's records, claimant did not work on October 2nd. Claimant was discharged in about two hours with a diagnosis of lumbar strain, was provided with medications and instructions for bed rest, a follow-up visit in 3-5 days, and told to return if he experienced numbness or weakness. An x-ray report of October 2nd concluded that claimant had "advanced levo convex lumbar scoliosis" and "slight increase in degenerative change about the 12/1 and 1/2 interspace." This report stated that claimant's x-rays were compared with similar exams of 8/25/89 and that there is "advanced rotatory levoscoliotic curve in the lumbar area . . . degenerative or post traumatic endplate abnormalities of L2 and L1 . . . some progression of the concave superior L1 endplate since the earlier study . . . no distinct new abnormality is seen, however, and there has been no change in alignment . . . no acute fracture or obstructive lesion is seen." These records showed claimant's employer as CP in (city), Texas. Claimant testified that he reported his employer as CP to hide the fact that this was a job-related injury. According to claimant, he had stumbled on the ladder step while getting some boxes of documents down from the attic at precinct two. He was aware he was on probation and was concerned he would lose his job if he reported this injury. He said he felt pain when he slipped off the step but kept going and thought the pain was from some prior injury.

Claimant introduced an "Amended" Employee's Notice of Injury or Occupational Disease and Claim for Compensation signed by his attorney on January l6, l992. This form stated that claimant's date of injury was "l0-2-9l" and that claimant's "back and body as a whole" was affected. His explanation of the accident stated that "[d]uring the course of my employment, I was shoveling dirt and I injured by (sic) back and body as a whole."

On October 4th, claimant told his wife to call Employer and report him as sick. Apparently claimant's wife reported that claimant had hurt his back lifting a baby out of the car. Claimant claimed that such an incident had not occurred in that his back hurt so bad he couldn't have bent over to pick up his daughter. He told his wife not to tell his supervisor about his back because he was hoping the back pain would go away in a few days.

On October l5th, claimant was seen by Dr. S of (Clinic 1) with a complaint of back pain for the past one and one-half weeks. The Clinic 1 record of this visit mentioned his visit to Hospital 1, listed his occupation as "construction," and stated that claimant "uses shovels, bends more than . . . in past 3 mo." These records also stated that claimant had a back injury four years ago without sequelae until this month, that claimant complained of tingling in his left thigh, and that he "[d]enied recent injury." The x-ray report showed "spina bifida [and] impressive scoliosis and degen. . . ." The diagnosis was new onset of lower back pain with a hint of L5-S1, radiculopathy with preexisting spinal changes. Treatment was to include a possible CT scan and a myelogram.

On either October l6th or l7th, claimant received the letter from Employer advising

that he was to be terminated and asking him to attend the "pre-deprivation meeting". Claimant called Employer in response to the letter and advised Employer he had hurt himself on the job. According to a witness for Employer, this telephone conversation was the first indication Employer had that claimant was claiming an on-the-job injury.

On October 2l, claimant returned to Clinic 1 for a follow-up visit where he was seen by Dr. L. The records of this visit state that "[h]is pain began near late September when shoveling in his work on a construction crew." Dr. L's assessment was "lumbar strain with scoliosis and radiculopathy. These records also state that [p]atient did not file the first visit under worker's comp. I completed the initial medical report in [Dr. S's] absence today." Claimant also introduced the "Initial Medical Report" (TWCC-61) dated "l0/l5/9l" which showed a date of injury of "9/5/91" and contained a diagnosis of lumbar strain. This exhibit was largely illegible but the words "after shoveling at work" do appear. This form was signed by Dr. L for Dr. S.

On October 29th, claimant returned to (Clinic 1) for a follow-up visit where he was again seen by Dr. L. The records of this visit indicated that claimant "is here for a follow up of Work Comp injury involving the lumbar back, with radiculopathy in the left leg. He has underlying scoliosis which may have been a contributing factor. His date of injury reportedly was 9-30-9l, while shoveling dirt on a construction job." Dr. L recited the results of a CT scan with myelogram as follows: "he has a subligamentous herniated disc in the T10-11 area, without nerve impingement. He had chronic osteophyte formation at the L-2, L-3 and L3-L4 disc spaces. He had a central and left paramedian soft tissue density and epidural indentation of the fecal sac at the L4-L5 disc space secondary to a herniated nucleus pulposus at the L4-L5 disc. In addition, there was a separate soft tissue density in the left L4-L5 neural foramina. Patient continues to have left sided lumbar pain with radiation into the left, at times he has had some numbness in the leg also." Dr. L's assessment at this visit was "[l]umbar strain with radiculopathy secondary to a herniated disc at L4-L5 level, with several other abnormalities on CT scan, of questionable clinical significance." Dr. L advised claimant of the likelihood he would require surgery and referred him to Dr. C.

On December 3, l99l, claimant was seen by Dr. C. The questionnaire claimant had to fill out stated the date of injury as "9-5-91". Dr C's report stated that claimant "denies any previous history of back trouble" and that "[o]n 5 September l99l, while working, shoveling, as a road paver, he developed sore back." This report went on to state that claimant "denies previous back trouble in spite of the serious scoliosis which he has." Dr. C's impression was "[c]ongenital lumbar scoliosis with degenerative changes. Herniated nucleus pulposus, midline left L4-5." He recommended that claimant undergo surgical excision of the left L4-5 disc.

Dr. T of the (Clinic 2) saw claimant on January l0, l992. Dr. T's report states that claimant gave "a history of no back pain prior to 9/1/91 when he was injured while shoveling at work. His symptoms began insidiously, . . ." In his "Second Surgical Opinion," Dr. T

stated his impression was "L4 disc herniation" and he agreed with the plan for surgical intervention.

Claimant maintained that his back injury, apparently referring to the herniated nucleus pulposus at L4-L5, was caused by his shoveling paving materials for Employer on or about September 5th or 6th. It is apparent from the record that the credibility of claimant's testimony had to have been a significant factor in the outcome of this case. Claimant presented no evidence to corroborate his testimony that he had even shoveled paving materials on September 5th or 6th, let alone that he hurt his back on such date. According to the records of Employer, claimant didn't work on September 5th. Explaining the several injury dates appearing in his medical records including September lst, 5th, and 30th, as well as claimant's testimony to September 6th, claimant contended he told everyone it happened around the first week in September and that he started putting down September 5th because he needed to identify an exact date. Regarding the notes in the medical records of Drs. C and T regarding claimant's denial of prior back pain when the records from Hospital 2 compared his x-rays of October 2nd with his similar exams of "8/25/89," claimant explained that the earlier report pertained to a pulled muscle which occurred on an earlier job; that he had not filed a claim as he was out only a short time; and, that the pain was a lot different than the pain he was presently experiencing from his back. His rationale for attempting to keep the knowledge of his job-related injury from Employer was that he was afraid he would lose his job if he reported the injury because he was on probation. Claimant did not explain why Dr. S's records of his visit on October l5th contained no mention of his back injury being job related and why the records of his next doctor's visit (to Dr. L on October 2lst) first mention "worker's comp" and his injury as being job related. Apparently he felt free to identify his employer and relate his injury to his work once he was terminated on October l6th. As for the amended notice of injury stating the date of injury as October 2nd, claimant in closing argument posited that such date was selected because that was the date the seriousness of claimant's injury became apparent and that while there exists a "confusion" as to dates, there is no question about claimant's back injury.

Carrier was the sole source of evidence as to when and how his injury occurred and was obviously an interested witness. Notwithstanding his interest, claimant's testimony could and did raise issues of fact for the fact finder. Gonzalez v. Texas Employers Insurance Ass'n, 4l9 S.W.2d 203, 208 (Tex.Civ.App.- Austin l967, no writ). As the sole judge of the credibility and weight to be given the evidence, the hearing officer rejected his testimony as he was free to do. Article 8308-6.34(e) (l989 Act); Taylor v. Lewis, 553 S.W.2d l53, l6l (Tex.Civ.App.- Amarillo l977, writ ref'd n.r.e.). The provisions of Article 8308-6.34(e) have been adopted by the statute providing workers' compensation for county employees. TEX. REV. CIV. STAT. ANN. art. 8309h, § 3 (Vernon Supp. 1992). The hearing officer was not bound to accept claimant's testimony at face value. Long v. Knox, l55 Tex. 58l, 29l S.W.2d 292, 297-298 (l956). We do not substitute our judgment for that of the hearing officer when his findings are supported by some evidence of probative value. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana l989, no writ). Claimant's evidence did establish that he suffered from a herniated lumbar

disc and required surgery. However, we agree with the hearing officer that claimant failed to establish that he sustained his back injury when working for Employer. We find there is some evidence of probative value to support the hearing officer's findings and do not find them so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, 662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge